NO. 48888-4-II

IN THE COURT OF APPEAL OF WASHINGTON STATE
DIVISION II

STEVEN P. KOZOL, LARRY BALLESTEROS,
KEITH CRAIG, AND KEITH BLAIR,

Appellants,

v.

JPay, Inc., a foreign corporation,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY
THE HONORABLE MARY SUE WILSON

OPENING BRIEF OF APPELLANTS BALLESTEROS, CRAIG, AND BLAIR

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- ORIGINAL -

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I. INTRODUCTION

When customers purchase products from a company, the company's subsequent actions cause injury to the customers' purchases, and the company falsely represents that the only remedy available is for the customer to purchase more of the company's products, such unfair or deceptive acts violate the Consumer Protection Act.

When a company's actions cause injury to its customers' purchases and the company repeatedly rejects the customers' multiple demands for a remedy, the customers' injuries under the Consumer Protection Act are not vitiated simply because after suit was brought the company finally decided to provide a remedy.

Where a party responding to a motion for summary judgment dismissal establishes that it requires a CR 56(f) continuance and an order to compel discovery to obtain specific evidence that will create a genuine dispute of material fact, the trial court abuses its discretion when it denies the motion for continuance and motion to compel, but then grants summary judgment dismissal due to the non-moving party's failure to present the same necessary evidence it sought to raise a genuine issue of fact.

When an out-of-state defendant objects to a notice to appear for in-state depositions because it would be "unduly burdensome and expensive" for its CR 30(b)6) designees to travel to Washington, yet the defendant at approximately the same time

then has four employee representatives appear in Washington for another company purpose, such false objections should not be a basis to avoid deposition attendance.

Under the Uniform Declaratory Judgment Act, a plaintiff can have determined its rights as a third-party beneficiary to a contract.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred in granting summary judgment dismissal of Appellants' Consumer Protection Act and injunctive relief claims.

Assignment of Error No. 2: There was insufficient evidence by Respondent to establish an absence of a genuine issue of material fact as to Appellants' intentional tort claims.

Assignment of Error No. 3: The trial court erred in granting summary judgment dismissal of Appellants' intentional tort claims.

Assignment of Error No. 4: The trial court erred in finding the Appellants could not be entitled to damages.

Assignment of Error No. 5: The trial court erred in granting summary judgment dismissal of Appellants' Uniform Declaratory Judgment claims.

Assignment of Error No. 6: The trial court erred in denying Appellants' motion for CR 56(f) continuance and motion to compel discovery.

Assignment of Error No. 7: The trial court erred in denying Appellants' motion for reconsideration.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Issues Pertaining to Assignment of Error No. 1:

Issue No. 1: Did Appellants raise a genuine issue of material fact as to the unfair or deceptive act element of the Consumer Protection Act claims?

Issue No. 2: Did Appellants raise a genuine issue of material fact as to the injury element of the Consumer Protection Act claims?

Issue No. 3: Did Appellants raise a genuine issue of material fact as to a case-specific violation of the Consumer Protection Act?

Issue No. 4: Did Appellants raise a genuine issue of material fact as to a per se violation of the Consumer Protection Act?

Issue No. 5: Did Appellants raise a genuine issue of material fact as to their damages under the Consumer Protection Act?

Issue Pertaining to Assignment of Error No. 2:

Issue No. 1: Did Respondent's declaration evidence fail to establish the necessary personal knowledge of alleged fact to support summary judgment dismissal of Appellants' intentional tort claims?

Issues Pertaining to Assignment of Error No. 3:

Issue No. 1: Did Appellants raise a genuine issue of material fact as to Respondent's initial conversion of their property?

Issue No. 2: Did Appellants raise a genuine issue of material fact as to Respondent's continuing conversion of their property?

Issue No. 3: Did Appellants raise a genuine issue of material fact as to Respondent's trespass to chattels?

Issues Pertaining to Assignment of Error No. 4:

Issue No. 1: Is there a genuine issue of material fact as to damages available under the Consumer Protection Act?

Issue No. 2: Is there a genuine issue of material fact as to damages under the intentional tort claims?

Issue No. 3: Were Appellants required to mitigate their damages pertaining to the intentional tort claims?

Issues Pertaining to Assignment of Error No. 5:

Issue No. 1: Are Appellants entitled under the Uniform Declaratory Judgment Act to have their rights determined under a contract?

Issues Pertaining to Assignment of Error No. 6:

Issue No. 1: Did the trial court abuse its discretion in denying Appellants' motion for CR 56(f) continuance?

Issue No. 2: Did the trial court abuse its discretion in denying Appellants' motion to compel discovery?

Issues Pertaining to Assignment of Error No. 7:

Issue No. 1: Was Appellants' evidence newly discovered for purposes of CR 59(a)(4)?

Issue No. 2: Did Appellants' issues and evidence on reconsideration raise genuine issues of material fact precluding summary judgment dismissal?

IV. STATEMENT OF THE FACTS

JPay, Inc. is a private company located in Florida that sells digital media goods and services to prison inmates throughout the United States. Clerk's Papers (CP) 174. JPay entered into a contract with the Washington State Department of Corrections (WDOC) to be the exclusive provider of money transfer services, email services, digital media/music player devices, digital music downloads, and video visitation services to WDOC inmates and their families. Under the terms of the contract, DOC Contract No. K8262, WDOC permits inmates to purchase mp3 digital music players directly from JPay, and then purchase and download digital music content from a closed system of secure kiosks maintained and operated exclusively by JPay, installed within the prisons. CP 424-428.

Under the terms of Contract No. K8262 the purchased mp3 players and digital music content are the personal property of the inmate. Upon purchase of a mp3 player, JPay permanently installs the inmate's name and WDOC i.d. number onto the device before shipping it to the inmate, which serves as a security

identifier allowing prison staff to identify the owner of any inmate device. CP 305, 433. JPay's mp3 devices are fully secure and are designed to only sync and operate with the secure JPay kiosks, and will not permit the downloading of content or any access to the installed software by an inmate attempting to sync the device with any computer other than the JPay kiosk. This prevents an inmate from hacking into the device's software to perform unauthorized activity. CP 433.

Under the terms of Contract No. K8262 JPay agreed that the purchase costs to inmates for digital music sales on the JPay kiosk system would be "comparable to cost from major providers such as iTunes." CP 308.

Since its entry into the for-profit services sector of the corrections industry, JPay has been the subject of several investigations for unlawful business practices and has incurred six-figure fines for its violations. CP 185, 187-195. An extensive investigation in 2014 exposed that JPay's music content offerings actually cost 30% to 50% more than they would on iTunes. CP 185. As a result of its overly high fees, JPay generated well over $50 million in revenue in 2013, and projected its earnings for subsequent years to be increased by a multiple factor. CP 188.

Throughout the span of its contract with the WDOC, JPay has developed three models of mp3 music/media devices. The initial model device, the "JP3," was a compact, multi-function

device that played digital music files, video games, displayed videos and photos, and contained an F.M. radio. CP 565-577.

The Appellants/Plaintiffs, Steven P. Kozol, Larry Ballesteros, Keith Blair, and Keith Craig, each purchased a JP3 device from JPay and purchased music content for the device. The Appellants used their JP3 devices for a few years without incurring any system or software problems.

In 2014 JPay introduced a newer model player called the "JP4," which JPay claimed was an improvement over the JP3. However, the only significant improvement with the JP4 was that it offered the function for an inmate to compose emails on the device, instead of sitting and writing an email using the keyboard on the JPay kiosk. Otherwise, the earlier JP3 models still played the same videos, music files, and displayed photos (CP 565-577), and the JP4's were much larger and heavier, used a cumbersome touch screen and were plagued with software glitches. CP 419-420.

While most WDOC inmates were enticed into purchasing a newer model JP4 as an upgrade from their JP3s, some inmates did not want to have to unnecessarily spend more money ($60.00) to simply purchase another device to listen to their music, when their current JP3 still functioned without any issues. Upon the launch of the newer JP4 devices, these remaining inmates' JP3 model devices began, for no apparent reason, to mysteriously "lock up" and became "unassigned," with the inmate's name and prison i.d. number being suddenly removed from the device. Instead,

the JP3s now displayed "Property of JPay - Unassigned" on the screens, and would not operate to play any of the installed music content, video games, radio, etc. These "lock-ups" began as early as March 2014, around the same time the JP4 model was introduced. CP 291-295. This continued for the next twelve months, whereupon most such inmates were forced to purchase a newer JP4 device just to continue listening to their music they had already purchased.

In May 2015, the JP3 devices belonging to the Appellants were functioning without issue, but when each device was plugged into a JPay kiosk on separate days to download newly-purchased music content, each JP3 suddenly became "locked," would not function, and instead of the inmate's name and DOC i.d. number appearing on the device's screen, it now displayed "Property of JPay - Unassigned." CP 268-270, 310-312, 318, 320, 321-323.

Appellant Steven Kozol sent a "help ticket" to JPay on May 11, 2015 requesting that JPay unlock his JP3 so he could use it. JPay did not respond. CP 269-271 (¶ 5). On May 18, 2015, Mr. Kozol sent a demand letter to JPay corporate headquarters via Certified U.S. Mail. CP 273-277, 442-446. Mr. Kozol waited patiently, but his letter was also ignored. On June 2, 2015, Mr. Kozol mailed another letter requesting JPay unlock or refurbish his JP3. CP 212. JPay failed to respond. Mr. Kozol then sent another help ticket on June 10, 2015 notifying JPay that apparently something in the kiosk software had locked and

unassigned his JP3. JPay's response was to simply rebuff Mr. Kozol's complaint, and instead told him that he could "keep all of [his] music" and have his music account "reset" if he purchased a newer JP4 device. CP 436.

Recognizing that it was an unfair business practice for JPay to "unassign" and "lock" his JP3 device and then force him to spend more money to buy a newer device just so he could continue to listen to his purchased music library, Mr. Kozol submitted another help ticket on June 22, 2015, notifying JPay that it would soon be served with a lawsuit for its violations of the Washington Consumer Protection Act, the intentional torts of conversion or trespass, and other claims. JPay did not offer to provide Mr. Kozol a replacement player, but instead again told him that he would have to purchase another music player in order for him to access his previously purchased music content. CP 438.

Mr. Kozol filed this action on June 16, 2015. CP 6. Service of process was completed on June 29, 2015. CP 585. Only after being served with the suit did JPay begin offering a replacement JP4 model device as a free replacement, starting on July 10, 2015. CP 280.

Additional inmates had also been injured by JPay's actions of "locking" their JP3 devices and unassigning them to become "Property of JPay." CP 310-323. Having received the same false responses from JPay that their JP3s could not be unlocked, that

no replacement JP3s or other models were available, and that their only option to be able to continue accessing their music purchases was to purchase a newer JP4 model device, inmates Larry Ballesteros and Keith Blair asked Mr. Kozol to help them seek judicial relief. A motion to file a complaint as intervening plaintiffs was granted. CP 558. The intervenors timely filed their complaint. CP 543-554. Another injured inmate, Keith Craig, had filed his own suit, and the trial court granted the motion to consolidate the two cases. CP 555.

V. PROCEDURAL HISTORY

Appellant Kozol moved for partial summary judgment as to liability. CP 403-456, 460-467, 391-401. After new evidence came to light, Mr. Kozol again moved for partial summary judgment. CP 17-27, 58-61, 376-390. Respondent cross-moved for summary judgment dismissal of all claims. CP 90-111. Both parties filed responses in opposition to the cross-motions for summary judgment (CP 247-337, 243-246, 58-61), and replies. CP 376-390, 513-523. Appellants moved to reschedule summary judgment due to their evidence being seized. CP 62-75. Appellants moved for a CR 56(f) continuance (CP 124-130), and a motion to compel discovery. CP 338-375.

The trial court denied Appellants' motion for partial summary judgment. CP 502-503. The trial court denied the motions for continuance and to compel. CP 506-509. The trial court granted summary judgment dismissal in favor of Respondent. CP 510-511.

Appellants moved for reconsideration of summary judgment and the motion to compel and to continue. CP 131-242. Respondent filed a response. CP 495-500. The trial court denied reconsideration. CP 512. This timely appeal ensues.

VI. ARGUMENT

A. Standard of Review on Summary Judgment and Reconsideration

Summary judgment is proper if, after viewing all the pleadings, affidavits, depositions, admissions, and reasonable inferences in favor of the non-moving party, the court concludes that (1) there is no genuine issue as to any material fact; (2) reasonable persons could reach only one conclusion; and (3) the moving party is entitled to judgment as a matter of law. Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). The moving party has the burden of demonstrating that there are no genuine issues of material fact, regardless of who bears the burden of proof on a particular issue at trial. Hudesman v. Foley, 73 Wn.2d 880, 441 P.2d 532 (1968). The opposing party does not need to submit affidavits or responding materials unless the movant meets its burden. Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 757 P.2d 507 (1988).

Summary judgment is not warranted when, although evidentiary facts are not in dispute, different inferences may be drawn from them as to ultimate facts such as intent, knowledge, good faith, or negligence. Preston v. Duncan, 55 Wn.2d 678, 349 P.2d 605

(1960); State Bank v. Burk, 100 Wn.App. 94, 995 P.2d 1272 (2000) (summary judgment is not proper if reasonable minds could draw different conclusion from otherwise undisputed evidentiary facts). A conflict in the facts asserted in the affidavits and counter-affidavits essentially presents an issue of credibility, and when there is such conflict, summary judgment should be denied. Balise v. Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963). When parties have presented sharply conflicting evidence on a material issue, the issue cannot be resolved as a matter of law by a summary judgment. No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc., 71 Wn.App. 844, 863 P.2d 79 (1993).

The standard of review of a summary judgment ruling is de novo; the appellate court engages in the same inquiry as the trial court. Schaaf v. Highfield, 127 Wn.2d 17, 896 P.2d 665 (1995). A ruling denying CR 59 reconsideration of a summary judgment is also reviewed de novo. Rodriguez v. City of Moses Lake, 158 Wn.App. 724, 728, 243 P.3d 552 (2010), review denied, 171 Wn.2d 1025 ("Where a trial court grants summary judgment and then denies reconsideration, evidence offered in support of the motion for reconsideration is properly part of an appellate court's de novo review.") (citing Tanner Elec. Co-Op. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 675 n.6, 911 P.2d 1301 (1996)); Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1988)(de novo review standard applies to "all trial court

rulings made in conjunction with a summary judgment motion.") When an order on a CR 59 motion is based upon rulings of law, no element of discretion is present, and the rulings are subject to de novo review. Allyn v. Boe, 87 Wn.App. 722, 729, 943 P.2d 364 (1997), review denied, 134 Wn.2d 1020; Detrick v. Garretson Packing Co., 73 Wn.2d 804, 812, 440 P.2d 834 (1968).

B. The Trial Court Erred In Granting Summary Judgment Dismissal of Appellants' Consumer Protection Act Claims

To prevail in a private Consumer Protection Act (CPA) claim, a plaintiff must prove: "(1) unfair or deceptive acts or practices; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; [and] (5) causation." Mellon v. Regional Trustee Services Corp., 182 Wn.App. 476, 487, 334 P.3d 1120 (2014) (citing Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986)); see RCW 19.86.020, .090.

JPay moved for summary judgment dismissal of the Appellants' CPA claims on the basis that there (1) was no injury to the appellants, and that (2) there was no unfair or deceptive act committed by JPay. CP 101-102. The trial court granted summary judgment dismissal of the CPA claims on the basis that (1) JPay's actions did not give rise to a determination of an unfair or deceptive act or practice, and (2) there was no injury caused to the Appellants for CPA purposes. Verbatim Report of Preceedings (RP), 38-40.

However, the trial court erred in dismissing these CPA claims, because when viewed in the light most favorable to the Appellants as the party opposing summary judgment, the evidence in the record establishes genuine issues of material fact as to Appellant's injuries, and as to JPay acting unfairly or deceptively for purposes of the CPA.

1. Unfair or Deceptive Act or Practice

A plaintiff must predicate the first CPA element on "a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest." Mellon, 182 Wn.App. at 488 (citing Klem v. Wash. Mutual Bank, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013)(clarifying Hangman Ridge, 105 Wn.2d at 785-786). A defendant's act or practice is per se unfair or deceptive if it violates a statute declaring the conduct to be an unfair or deceptive act or practice in trade or commerce. Mellon, 182 Wn.App. at 488; Hangman Ridge, 105 Wn.2d at 786.

To state a claim for a per se CPA violation, the plaintiff must allege "'the existence of a pertinent statute'" and "'its violation.'" Fid. Mort. Corp. v. Seattle Times Co., 131 Wn.App. 462, 471, 128 P.3d 621 (2005)(quoting Keyes v. Bollinger, 31 Wn.App. 286, 290, 640 P.2d 1077 (1982)); see Dempsey v. Joe Pignataro Chevrolet, Inc., 22 Wn.App. 384, 393, 589 P.2d 1265 (1979).

If a defendant's act or practice is not per se unfair or deceptive, the plaintiff must show the conduct is "unfair" or "deceptive" under a case-specific analysis of these terms. Mellon, 182 Wn.App. at 489; see Klem, 176 Wn.2d at 785-787. Because the CPA does not define these terms, their meaning evolves through a "'gradual process of judicial inclusion and exclusion.'" State v. Reader's Digest Ass'n, 81 Wn.2d 259, 275, 501 P.2d 290 (1972)(quoting Fed. Trade Comm'n v. Raladam Co., 283 U.S. 643, 648, 51 S.Ct. 587, 75 L.Ed. 1324 (1931)), modified by Hangman Ridge, 105 Wn.2d at 786; see Saunders v. Lloyds of London, 113 Wn.2d 330, 344, 779 P.2d 249 (1989).

Courts must liberally construe the CPA to serve its beneficial purpose and may look to federal law for guidance in doing so. Mellon, 182 Wn.App. at 489; RCW 19.86.920. The Washington Supreme Court has suggested a defendant's act or practice might be "unfair" if it "'causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits.'" Mellon, 182 Wn.App. at 490; Klem, 176 Wn.2d at 787 (quoting 15 U.S.C. § 45(n)).

Similarly, a defendant's act or practice might be "unfair" if it "offends public policy as established 'by statutes [or] the common law,' or is 'unethical, oppressive, or unscrupulous,' among other things." Klem, 176 Wn.2d at 787 (quoting Magney v. Lincoln Mut. Sav. Bank, 34 Wn.App. 45, 57, 659 P.2d 537

(1983)); see Federal Trade Comm'n v. Sperry & Hutchinson, Co., 405 U.S. 233, 244 n.5, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972) (quoting Unfair or Deceptive Advertizing and Labeling of Cigarettes in Relation to the Health Hazzards of Smoking, 29 Fed Reg. 8324, 8355 (1964)). For example, advancing a substantively or procedurally unconscionable contract term is likely an "unfair" act or practice. Mellon, 182 Wn.App. at 490. See State v. Kaiser, 161 Wn.App. 705, 722, 254 P.3d 850 (2011)(citing State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 87 Wn.2d 298, 309, 553 P.2d 423 (1976)).

Even accurate information may be deceptive "'if there is a representation, omission or practice that is likely to mislead.'" Kaiser, 161 Wn.App. at 719 (quoting Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 50, 204 P.3d 885 (2009)). "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." Holiday Resort Cmty. Ass'n v. Echo Lake Assoc., LLC, 134 Wn.App. 210, 226, 135 P.3d 499 (2006).

Whether viewed under a per se analysis, or a case-specific analysis, JPay's actions in this case were unfair or deceptive.

2. Case-Specific Unfair or Deceptive Act

Under a case-specific analysis, there is a genuine issue of fact precluding summary judgment as to whether JPay committed unfair or deceptive acts under the Consumer Protection Act.

First, it is undisputed that it was the computer code from JPay's operating software that caused each of Appellants' JP3 devices to become "locked" and "unassigned" when plugged into the JPay kiosk system. In response to JPay's summary judgment motion each Appellant testified that the locking of his JP3 occurred when it was docked with the JPay kiosk. CP 268-270, 310-312, 318-320, 321-323. JPay conceded that it was a software code issue that caused each of Appellants' JP3 devices to become locked when docked into the JPay kiosk system.[1] CP 84-88.

Second, prior to being forced to file suit, the only response the Appellants received to their help tickets was JPay's flat refusal to help and only telling the Appellants such deceptive statements as "there is nothing we can do to unlock it. The player...can't be repaired or replaced....JPay no longer provides support for that older device," (CP 436), and "[w]e cannot unlock the JP3 player." CP 313-318.

Third, overwhelming evidence establishes that JPay has **always** been able to "unlock" a locked JP3 device, and it has **always** been able to service, repair, refurbish or replace the Appellants' JP3s. Undisputed evidence shows JPay previously "unlocked" many JP3 devices for other WDOC inmates at the Stafford Creek Corrections Center. CP 327-330. WDOC staff notified inmates

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[1] It is not yet determined whether the software issue was due to an intentional computer command to lock and unassign the JP3 device, or if it was an inadvertent software glitch. This material fact can only be established by way of evidence obtained pursuant to Appellants' motions for CR 56(f) continuance and to compel discovery. See infra.

that JPay can enable WDOC staff to unlock a locked JP3 (id.), which is expressly corroborated by JPay's JP3 Instruction Manual. CP 572. Not only does this undisputed evidence show that JPay previously "unlocked" other DOC inmate's JP3 players that had experienced the identical problems of becoming "locked", having their names and prison i.d. numbers unassigned, and the JP3s becoming "Property of JPay - Unassigned" (CP 327-330), but JPay Customer Service Help Desk's standardized responses show that at any time JPay could have made available to Appellants the "unlock option" on the JPay kiosk to "unlock [the] player during [the] next login." CP 281-283.

What is more, JPay's customer service staff are "happy to unlock" JPay players for other inmates, including those being released from prison. The "locked" devices are sent back to JPay and then "[i]t will be unlocked with existing music" entact. CP 171. Appellant Kozol wrote a letter specifically asking to mail his JP3 to JPay so it could be unlocked. CP 212. JPay ignored Mr. Kozol's request, but freely "unlocks" other inmates' devices in this manner.

Fourth, after being sued JPay then identified by sworn declaration that it actually did have in inventory replacement JP3s that could have been provided to Appellants at any time ("Supplies of old JP3 players are very limited"), CP 87; and that at any time it could have repaired/refurbished Appellants' locked JP3 devices ("JPay has refurbished five JP3 players and

is in the process of delivering those players to Stafford Creek so that the Plaintiffs have the option of taking a refurbished JP3 or a free upgrade to a new model.") CP 87.

Based upon these undisputed facts, there exists a genuine issue of material fact of whether it was an unfair or deceptive act or practice by JPay -- upon its software code "locking" the Appellants' JP3s -- to falsely tell the Appellants that their JP3s could not be unlocked, repaired, refurbished or replaced, and proceed to tell them that the only way thay could continue to access and listen to their purchased music, video games, and F.M. radio was if they bought a newer model $60.00 device from JPay.

There is no question that this attempt to force additional purchases was JPay's consistent response. Even when Mr. Kozol notified JPay in a help ticket dated June 22, 2015, at 8:36 A.M., that he had filed a suit and would soon be serving the Summons and Complaint, JPay responded within 17 seconds, and told Mr. Kozol at "8:36:17 AM EST" that his only option was to spend more money to purchase another device if he wanted to continue to access and listen to his previously purchased music. CP 438.

It was only after Mr. Kozol effectuated service of process against JPay on June 29, 2015 (CP 585) that JPay finally began offering a replacement device (newer model JP4) at no cost to the Appellants on July 10, 2015. CP 440. Based upon this undisputed fact that JPay's only response prior to being sued

was to falsely tell the Appellants that nothing could be done, and instead JPay relentlessly tried to force the Appellants to purchase newer model players, such actions are "unfair" or "deceptive" under the CPA.

Even if JPay were to establish that these statements were somehow made in a vacuum without any knowledge of the fact that multiple remedies existed to offer to the Appellants, it is of no moment for purposes of the CPA. "To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has 'the capacity to deceive a substantial portion of the public.'" Kaiser, 161 Wn.App. at 719 (quoting Hangman Ridge, 105 Wn.2d at 785).

Falsely telling consumers that they must purchase new mp3 players in order to listen to already purchased music -- when in fact JPay could have fixed the problem (caused by JPay) all along, at no cost to the consumer -- is an unfair or deceptive act that not only has the capacity to deceive the average consumer who is somewhat uninitiated in computer technology, but is all the more unfair or deceptive when occuring in circumstances where the consumers are literally a captive audience who largely have nowhere to turn for information, are generally of lower intelligence, and have no ability to purchase a digital music device or music from another source. These captive consumers that JPay exerts its profiteering squeeze upon would have no basis to know what a private company like JPay could or could

not do to unlock, service or "refurbish" JP3 players, because these consumers are effectively subjected to the monopolistic whims of JPay who controls the information about the products and services. It is clear that JPay's actions were "unfair" or "deceptive," because the actions were "unethical, oppressive, or unscrupulous" under the circumstances. Klem, 176 Wn.2d at 787 (citation omitted). See State v. Kaiser, 161 Wn.App. 705, 708, 721, 254 P.3d 850 (2011) (finding a company that "preyed on property owners" by falsely offering to help save the property from foreclosure "had committed an unfair or deceptive act under the CPA" without reference to any specific statutory provision). "Given that there is 'no limit to human inventiveness,' courts, as well as legislatures, must be able to determine whether an act or practice is unfair or deceptive to fulfill the protective purposes of the CPA." Klem, 176 Wn.2d at 786 (quoting Panag, 166 Wn.2d at 48).

Moreover, JPay's actions in this case are nothing new under the sun. Viewing the facts and all inferences in the light most favorable to the Appellants, JPay's acts or practices are simply an extension of its other unscrupulous business practices of taking advantage of captive customers and families by leveraging their disadvantaged position to maximize profits. CP 187-195.

3. Per Se Violation of the CPA

As established by statutory language:

> "[i]t is a violation of the Consumer Protection Act, chapter 19.86 RCW, to assist in the transmission of a commercial electronic mail message, when the person providing the assistance knows, or consciously avoids knowing, that the initiator of the commercial electronic mail message is engaged, or intends to engage in any act or practice that violates the Consumer Protection Act."

RCW 19.190.030(2).

The undisputed facts in the record show that at any time JPay was able to repair, refurbish or unlock the Appellants' JP3s, or could have provided replacement JP3s from its inventory. The facts also show that JPay falsely represented in "help ticket" emails to the Appellants that nothing could be done, and the only way to have access to and use of their purchased music content was for Appellants to spend more money and purchase newer model JP4 devices. CP 313-318, 436, 438.

When viewed in the light most favorable to the Appellants, the facts and all reasonable inferences therefrom create a genuine issue of whether JPay's false, unfair, or deceptive commercial email responses to the Appellants are a per se violation of the Consumer Protection Act under RCW 19.190.030(2). Because there is a genuine issue as to "the existence of a pertinent statute" and "its violation," Fid. Mort. Corp., 131 Wn.App. at 471, the trial court erred in granting summary judgment dismissal of these CPA claims.

4. Injury to Appellants under the CPA

To sustain a CPA claim, a plaintiff must also show that he or she was injured in his or her "business or property." Hangman Ridge, 105 Wn.2d at 792. As the Supreme Court established, "[t]he injury involved need not be great, but it must be established." Id. According to the Supreme Court, "'injury' is distinct from 'damages.' Monetary damages need not be proved; unquantifiable damages may suffice." Panag, 166 Wn.2d at 58.

Because the CPA is to be liberally interpreted in the spirit of protecting consumers, see RCW 19.86.920, a plaintiff does not have to lose property completely to prove injury. The injury requirement is liberally construed so that it can even be satisfied with proof that a property interest or monetary value is diminished as a result of the defendant's unlawful conduct, even if the expenses incurred by the violation are minimal. Investigation expenses and other costs are therefore sufficient to constitute an injury under the CPA. Trujillo v. N.W. Tr. Servs., 183 Wn.2d 820, 837, 355 P.3d 1100 (2015).

By this minimal standard, there certainly exists a genuine issue of material fact as to whether there was an injury sustained by Appellants. First, after JPay ignored Mr. Kozol's initial "help ticket" complaint, he had to expend monetary resources to mail a demand letter via Certified U.S. Mail to investigate a remedy from JPay. CP 443-446. Still being ignored by JPay, Mr. Kozol then had to expend additional resources to file this

lawsuit, which included expenses incurred for the service of process. CP 585.

Second, JPay's digital interference with the JP3 devices, the related refusal to provide a no-cost remedy, and its attempt to force Appellants to purchase additional media devices caused each Appellant to completely lose the ability to access and listen to their purchased music content, F.M. radio, and video games. This is clearly an injury for purposes of the CPA. As the undisputed evidence makes clear, once each JP3 became "locked" and "unassigned" by JPay, the JP3 and its functions and contents became completely inoperable, as JPay designed the JP3 so that "[o]nce the player is locked users cannot use it anymore." CP 572. As JPay stated to Appellant Blair, "once we deactivate your existing player you will no longer be able to download music or purchase new music until you actually buy a new player." CP 217.

Considering the undisputed fact that the Appellants had spent thousands of dollars on music purchases from JPay -- Mr. Kozol alone had purchased approximately 1700 songs, being charged as much as $1.99 per song (CP 8-9) -- and they could no longer access/use this chattel unless they spent additional money to buy another JPay media device, this establishes an "injury to plaintiff in his or her business or property." Hangman Ridge, 105 Wn.2d at 780; see RCW 19.86.080, .093(3)(a),(b). Furthering the injury, after JPay locked Mr. Kozol's JP3, the company went

to the extent to tell him that he no longer owned a JP3 music player. CP 26-34. This is outrageous, and is unfair or deceptive.

JPay's actions left the Appellants completely helpless in terms of being able to use their chattel. The JP3s they possessed were "locked," "unassigned," and were now "Property of JPay." Their purchased music content remained digitally captive on the JPay kiosk computer servers, and there was no way to even send their purchased music to a friend or family in the community as the music could only be accessed during Appellants' incarceration by using a JPay media device. In sum, their music and media players were effectively rendered worthless, unless the Appellants paid JPay's ransom and bought another media device. Then JPay would let them "keep all of [their] music" and would "reset" their music accounts. CP 436.

Viewing all facts and inferences in the light most favorable to Appellants, the trial court's finding of no injury under the CPA is nonsense.

Not only would JPay's unscrupulous tactics never be possible in the marketplace outside of prisons (and, in fact, it appears to be JPay's primary means of sustainability to take advantage of the captive prison customer base by overcharging and frequently manipulating their customers), but such methods are an anachronistic throwback to an era where such predatory practices were more prevalent and bolstered the need for enactment of strong consumer protection laws. JPay's actions here are strikingly

similar to the CPA violations found in State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 87 Wn.2d 298, 553 P.2d 423 (1976), where

> "[a]s part of the normal sales procedure, [the dealer's] sales personnel would obtain a customer's car for trade-in evaluation purposes. When a customer later objected to the increased price or merely declined to buy a car, the employee told the customer he could not return his automobile. This procedure was designed to exert pressure upon customers to buy an automobile."

Id., at 307. In the instant case, a mysterious software function locked Appellants' JP3s, and instead of offering a no-cost remedy, JPay misled its customers and told them no solution was available except for them to purchase more of JPay's products. In fact, JPay has continued to utilize this same pressure tactic, forcing owners of JP4 devices to purchase the newest model JP5 device upon another mysterious software glitch having reared its ugly head and "locked" their otherwise fully-functioning JP4s. CP 232-236. Will such wonders ever cease? These continuing practices are precisely what a finding of a CPA violation and imposition of fines is designed to deter.

And it is of no moment that JPay eventually tried to clean up the situation by offering free upgrades of JP4s to the Appellants. Not only were these JP4 models plagued with software glitches and bugs, were much heavier and cumbersome to use compared to the JP3s, and had decreased audio quality and less available on-board memory to store music files (CP 419-420),

but JPay was in the process of "discontinuing" the JP4s in 2015 so it could get inmates to spend more money and purchase the next-generation JP5 model device. CP 300-302. In fact, JPay's plan was to get every inmate to "transfer from JP4s to JP5s" (CP 176), and it was inconvenienced by having to permit prior JP3 and JP4 model devices to continue to function because "[t]he JP4 and JP5 are working on the same network with conflicting technology." CP 178. As such, not only did the Appellants not want a defective, problematic JP4 device (CP 441), but these JP4s also being discontinued would again leave the Appellants (in the probable event such JP4s "locked up") in the position of having to purchase newer model JP5s just so they could still listen to their purchased music.

From a public policy perspective, JPay's notion that no injury occurred because it eventually provided a no-cost replacement is a fallacy. If a company that is misleading consumers to force them to purchase more products could escape a potential CPA violation by simply waiting until a suit was filed, and only then, when caught, offer a no-cost remedy and claim the problems complained of were all just a honest mistake or oversight, then there would be little force or effect in the statutory scheme of the Consumer Protection Act. A plaintiff's CPA claims are not somehow vitiated because of a company's post hoc efforts to ameliorate its position; this would render the legislative intent behind the CPA to be nothing more than a hollow

assemblage of unenforceable protections carrying no real deterrent value as a whole.

The legislature intended for any business that violates the Consumer Protection Act, RCW 19.86.020, to be subject to civil penalty of up to $2,000 for each violation. RCW 19.86.140. Such penalties could never be imposed if all a defendant had to do was, like JPay did here, wait until being sued under the CPA to offer a remedy to the consumer, and then claim there was no injury. Without the deterrent effect of penalties, the legislative intent for consumer protection as a whole would be rendered a nullity.

In turn, this would mean that the only class of consumers who could compel a remedy from a company's unfair or deceptive practices are those consumers having the means and wherewithal to initiate litigation, and that those bringing a private CPA claim could perhaps expect a remedy, but would never be awarded costs of suit or attorney fees, see RCW 19.86.090, because any remedy by the defendant after being sued would defeat the injury element necessary to sustain a CPA claim. Without the ability to recover statutory costs and attorney fees under the CPA, only those who could afford to absorb the costs of litigation could be able to compel a remedy from a defendant by bringing a CPA action.

It is therefore contrary to the plain statutory language and legislative intent of the Consumer Protection Act to conclude

that an injury giving rise to a CPA claim is vitiated by a defendant providing a post hoc remedy after suit is brought.[2]

5. JPay's User Agreement Is Unconscionable and "Unfair" Under the CPA

A contract term is substantively unconscionable where it is "one-sided or overly harsh," "[s]hocking to the conscience," "monstrously harsh," or "exceedingly calloused." Gandee v. LDL Freedom Enters., 176 Wn.2d 598, 603, 293 P.3d 1197 (2013). On summary judgment JPay asserted that its user agreement absolved and insulated JPay from any liability for its intentional or unintentional actions of "deactivating" or "locking" Appellants' JP3s, interfering with their dominion, ownership, or use of their chattel, or trying to force Appellants to purchase new media devices by falsely stating that JPay could not refurbish, service, unlock, repair or replace their JP3s. Essentially, JPay argued that its user agreement permits it to do anything it desires to the Appellants' music players or music purchases.

To the extent that this may have been a basis for the trial court's granting of summary judgment, the JPay user agreement is an unconscionable contract that constitutes an "unfair" act or practice under the CPA. See Gandee, 176 Wn.2d at 606 (Court held that because an agreement provision "serves to benefit only

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[2] This principle appears in other statutory schemes, such as the Public Records Act, chapter 42.56 RCW. "Government agencies may not resist disclosure of public records until a suit is filed and then, by disclosing them voluntarily, avoid paying fees and penalties." West v. Thurston County, 144 Wn.App. 573, 581, 183 P.3d 346 (2008).

[the one party], and contrary to the legislature's intent, effectively chills [the other party's] ability to bring suit under the CPA, it is one-sided and overly harsh. Therefore we hold it to be substantively unconscionable.")

Here, JPay argued that it was not liable for the injury caused by its software commands that "locked" and "unassigned" the Appellants' JP3s to become "Property of JPay" (whether intentional or unintentional) because the language of the user agreement caused the Appellants to waive all liability against JPay when each of them accepted the terms of the click-through agreement. CP 515.

To the contrary, JPay's user agreement is "unfair" as it leaves the Appellants completely unprotected from consequences that could not have been reasonably foreseen by them at the time the agreement was entered into. CP 580-581. To the extent that JPay is arguing its user agreement insulated it from liability, such an argument is the manifestation of the company's exploitative business perspective that it is subject to no laws for its misconduct against Washington State consumers.

JPay asserts it can intentionally or unintentionally "lock" or "malfunction" Appellants's JP3s at will, and force them to purchase new devices as the only way to access their music purchases, because the user agreement permits such activity. But as the Supreme Court has held, such an agreement provision is substantively unconscionable because it "serves to benefit

only [one party]," is "contrary to the legislature's intent," is "one-sided and overly harsh," and "effectively chills [the consumers'] ability to bring suit under the CPA." Gandee, 176 Wn.2d at 606.

At all rates, the JPay user agreement cannot apply to Appellant Kozol, as he expressly rejected all such user agreements. CP 197. JPay did not dispute Mr. Kozol's rejection of all user agreement terms, and agreed by acquiescence, continuing to sell goods and services to Mr. Kozol.

To the extent that summary judgment was based upon JPay's user agreement, summary judgment was precluded by the genuine issue of whether the user agreement was substantively unconscionable, and thus "unfair" under the CPA.

C. JPay's Evidence Was Insufficient To Support Summary Judgment Dismissal of Intentional Tort Claims

JPay argued that it did not intentionally "lock" or "unassign" the Appellants' JP3s, because based solely upon the Declaration of Shari Beth Katz the "malfunction" of the Appellants' JP3s was purely inadvertent as a result of a software update, and therefore it was not liable for the intentional tort of conversion or trespass to chattels. However, JPay's declaration evidence was insufficient for summary judgment purposes, and as a result JPay failed to show there was an absence of genuine issues of fact. Accordingly, summary judgment was precluded as a matter of law.

First, the Katz declaration fails to establish beyond a genuine dispute that the Appellants' specific JP3 devices were inadvertently locked and unassigned by the software update installed by JPay. Instead, Ms. Katz merely testified that JPay's new software "was causing many JP3 players to malfunction," and only speculated that "it is apparent that software for new models did cause malfunctions for some offenders." CP 86 (emphasis added). This testimony is overly-generalized, purely conclusory and speculative, and is inadmissible under CR 56(e); alternately, even as lay witness opinion testimony it must be based on first-hand knowledge or observation. ER 701; SentinalC3, Inc. v. Hunt, 181 Wn.2d 127, 142, 331 P.3d 40 (2014). Despite having all of the computer data at its disposal, JPay provided no evidence to establish that a software update inadvertently deactivated the Appellants' specific JP3 devices.

Second, Ms.Katz did not establish the fact of the time frame of employment at JPay, so it is not established if she worked at JPay at the time to have personal knowledge as to what occurred, nor knowledge as to JPay's intent at that time. Viewed in the light most favorable to Appellants, Ms. Katz was just hired by JPay the same day she signed the declaration. Thus, the declaration is not in conformity with CR 56(e) and is inadmissible. A court cannot consider inadmissible evidence on summary judgment. CR 56(e); Dunlap v. Wayne, 105 Wn.2d 529, 535, 716 P.2d 842 (1986).

Third, Ms. Katz also failed to establish that she had any first-hand personal knowledge of the writing of the computer code for the allegedly deficient software update that may have deactivated Appellants' JP3s on accident, nor any specific knowledge of the implementation or operation of the software. Nor does she establish by first-hand knowledge that she was personally involved in JPay's means of discovering or identifying that the software update for the JP4s accidentally deactivated Appellants' JP3s. Without more, her testimony is simply regurgitating office scuttlebutt, and at best her testimony is conclusory and hearsay. It is inadmissible under ER 602 and CR 56(e). See Wilkinson v. Chiwawa Cmty. Ass'n, 180 Wn.2d 241, 260-61, 327 P.3d 614 (2014)(Affirming trial court not considering declaration evidence on summary judgment, as "[n]either the [party's] intent, the activities of [others], the motivation of [others], nor the desires of [others] are within [the declarant's personal knowledge or perceptions.).

Affidavits must be made on personal knowledge of the affiant. CR 56(e); McKee v. Am. Home Prod. Corp., 113 Wn.2d 701, 782 P.2d 1045 (1989). The content of the affidavit itself must show the affiant's personal knowledge. Henry v. St. Regis Paper Co., 55 Wn.2d 148, 346 P.2d 692 (1959). It is not sufficient to merely state that the affiant is competent or has knowledge; the substance of the affidavit must provide verification of that assertion. Antonio v. Barnes, 464 F.2d 584 (4th Cir. 1972).

It is also insufficient to base the allegations of an affidavit on "information and belief." Stringfellow v. Stringfellow, 53 Wn.2d 639, 335 P.2d 825 (1959).

Ms. Katz's declaration is deficient in that she merely states "I have personal knowledge" of the speculations and conclusory facts she attests to. CP 84. The declaration fails to establish she had first-hand knowledge of any of the software issues, and only stated it was "apparent" with no foundation as to the specific basis or facts of her purported observations. This is echoed to be mere speculation in JPay's statement that "JPay has acknoweldged that the code appears to have caused malfunctions." CP 113 (emphasis added). "A defendant cannot push a plaintiff out of court by swearing that the plaintiff has no case." Klossner v. San Juan County, 21 Wn.App. 689, 696, 586 P.2d 899 (1978)(Anderson, J., concurring), aff'd, 93 Wn.2d 42 (1980); see also 10B Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE CIVIL 3d § 2738 (1998 & Supp. 2001).

In addition to the multiple deficiencies of JPay's evidence, there exists a genuine issue of fact when viewing all facts most favorably to the Appellants. Even the Katz declaration is soundly refuted by the evidence. JPay has the ability and practice of making a music player be intentionally "malfunctioned." CP 168. JPay's practice is to also "MALFUNCTION" a lost/stolen player. CP 169. Importantly, JPay's claim of a "JP4 software update" as the inadvertent cause of Appellants' injuries is refuted by

undisputed evidence showing the procedure for updating such JP4 software to a JP4 device requires each user with a JP4 to intentionally "select the 'music tab,'" then actively "click on 'Player Setting,'" and then "select the update button." After a JP4 user intentionally progresses through these specific steps, only then "the upgrade will begin automatically." CP 170. Because the JP4 software update **requires** a JP4 owner to activate the update procedure, there is no evidence in the record from JPay by a qualified declarant establishing how, or even if, a different model JP3 could be accidentally "malfunctioned" by different JP4 software as JPay merely speculated. In fact, JPay has contradicted its argument with its other statement that JPay's different model devices "are working on the same network with conflicting technology." CP 178.

The JP3 and JP4 models all used the same JPay kiosk system (CP 86), but other JP3 users in the same living unit as Appellants still had their JP3s fully functioning and syncing with the JPay kiosks as of October 2015. CP 237-242. Appellants' undisputed evidence shows that accidental deactivation of JP3s from a software update for JP4s would be reasonably expected to affect all discontinued JP3s that were no longer supported by the JPay software, upon such JP3s being plugged into the kiosk. CP 229.

Moreover, Appellants' undisputed evidence shows that once JPay "deactivates" a JP3, the users "would no longer be able to download music or purchase new music until you actually buy

a new player." CP 217. In fact, this is precisely what was expressly stated to Mr. Kozol. CP 26-34. All evidence points to Appellants' JP3s being intentionally "MALFUNCTIONED" by JPay, as Mr. Kozol being notified by the JPay kiosk that he no longer owned a music player, and could not purchase music until he purchased a player, is an automatic result inherent to an intentional "MALFUNCTION" as identified by JPay.

Viewed in the light most favorable to Appellants, this is certainly motivation for JPay to lock older model players to compel purchases of new JPay products. In fact, JPay continues to lock the JP4s to force purchases of the newest model JP5 device. CP 231-236. This is a viable business tactic for JPay, as it not only increases revenue by forcing new hardware purchases, but it benefits JPay to have standardized model devices in use by all customers, as it slows down the JPay kiosk operations (meaning less traffic and less sales of digital music downloads) when there are multiple different models of devices using the same platform, according to JPay. CP 176, 178.

In sum, it is unknown whether JPay intentionally "locked" and "unassigned" the Appellants' JP3s to force them to purchase new devices, or if this was all just one big coincidence of inadvertent happenstance that has befallen JPay as the unluckiest company in the world. The Katz declaration lacks personal knowledge, is purely speculative and conclusory, and is nothing more than a self-serving declaration loosely based upon facts

known only to JPay. Washington courts have held that where material facts averred in an affidavit are particularly within the knowledge of the moving party, it is advisable that the case go to trial so that the opponent can be allowed to disprove such facts by cross-examination and by the demeanor of the moving party. Gingrich v. Unigard Sec. Ins. Co., 57 Wn.App. 424, 788 P.2d 1096 (1990); Hulse v. Driver, 11 Wn.App. 509, 524 P.2d 255 (1974). Additionally, the mere fact that a witness as an employee is interested in the result of the suit is deemed sufficient to require the credibility of his/her testimony to be submitted to the jury as a question of fact. Sartor v. Ark. Natural Gas Corp., 321 U.S. 620, 88 L.Ed. 967, 64 S.Ct. 724 (1994).

Ms. Katz merely established she works for JPay and merely has belief or opinions as to what may have happened, which proves nothing material to the issue for summary judgment purposes. Despite having multiple computer programmers and I.T. specialists in a pool of at least 250 employees (CP 174), JPay's lone evidence to support its argument that it did nothing intentionally to lock Appellants' JP3s was a declaration from an administrative employee who had no first-hand knowledge whatsoever about any specific computer software facts material to the JP3s being "locked" and "unassigned."

Clearly, there exists no such evidence to prove beyond genuine dispute that JPay's actions were unintentional. If JPay could prove it was a software update problem, they were required

to actually prove it with competent, admissible evidence. Apparently, no such evidence exists.

If Appellants can complete the necessary discovery and conclusively show that JPay intentionally locked their JP3 devices, JPay would not be entitled to summary judgment dismissal of Appellants' CPA, conversion, and trespass to chattels claims. The court must deny a motion for summary judgment if the record shows any reasonable hypothesis that entitles the non-moving party to the relief sought, i.e., denial of summary judgment. Mostrom v. Pettibon, 25 Wn.App. 158, 607 P.2d 864 (1980). Because the Katz declaration fails to establish beyond genuine dispute what actually caused the Appellants' JP3s to become "locked" and "unassigned," there is a genuine issue precluding summary judgment dismissal.

D. The Trial Court Erred In Granting Summary Judgment Dismissal of Appellants' Conversion Claims

Pursuant to RAP 10.1(g), Appellants Ballesteros, Craig, and Blair hereby incorporate and adopt the arguments presented in Section VI(D) of the Opening Brief of Appellant Kozol.

E. The Trial Court Erred In Granting Summary Judgment Dismissal of Trespass to Chattels Claims

Pursuant to RAP 10.1(g), Appellants Ballesteros, Craig, and Blair hereby incorporate and adopt the arguments presented in Section VI(E) of the Opening Brief of Appellant Kozol.

F. A Genuine Issue of Material Fact as to Damages Precluded Summary Judgment Dismissal

Pursuant to RAP 10.1(g), Appellants Ballesteros, Craig, and Blair hereby incorporate and adopt the arguments presented in Section VI(F) of the Opening Brief of Appellant Kozol.

G. The Trial Court Erred In Granting Summary Judgment Dismissal of Appellants' UDJA Claims

Pursuant to RAP 10.1(g), Appellants Balesteros, Craig, and Blair hereby incorporate and adopt the arguments presented in Section VI(G) of the Opening Brief of Appellant Kozol.

H. The Trial Court Erred In Denying Appellants' Motions To Compel Discovery and For A CR 56(f) Continuance

Pursuant to RAP 10.1(g), Appellants Ballesteros, Craig, and Blair hereby incorporate and adopt the arguments presented in Section VI(H) of the Opening Brief of Appellant Kozol.

I. The Trial Court Erred In Denying Reconsideration

Pursuant to RAP 10.1(g), Appellants Ballesteros, Craig, and Blair hereby incorporate and adopt the arguments presented in Section VI(I) of the Opening Brief of Appellant Kozol.

J. Appellants Should Be Awarded Reasonable Costs on Appeal

Pursuant to RAP 10.1(g), Appellants Ballesteros, Craig, and Blair hereby incorporate and adopt the arguments presented in Section VI(J) of the Opening Brief of Appellant Kozol.

VII. CONCLUSION

For all the foregoing reasons, Appellants respectfully submit that the trial court erred in denying the motion to continue and to compel, and that the court erred in granting summary judgment dismissal of Appellants' CPA, conversion, trespass to chattels, UDJA, and injunctive relief claims. This appeal should be granted.

R RESPECTFULLY submitted this 3rd day of December, 2016.

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DECLARATION OF SERVICE BY MAIL
GR 3.1

I, LARRY BALLESTEROS, declare and say:

That on the 3rd day of December, 2016, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 48888-4-II:

Opening Brief of Appellants Ballesteros, Craig, and Blair;

;

;

.

addressed to the following:

Clerk of the Court	John A. Kesler III
Washington Court of Appeals	Bean, Gentry, Wheeler &
Division II	Peternell, PLLC
950 Broadway, Suite 300	910 Lakeridge Way S.W.
Tacoma, WA 98402	Olympia, WA 98502

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 3rd day of December, 2016, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Signature

Larry Ballesteros
Print Name

DOC# 847194 UNIT# H6-A91
STAFFORD CREEK CORRECTIONS CENTER
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